In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ————

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH P. LUCIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, which upheld the decision of a panel of that court in the above case.

OPINION BELOW

The *per curiam* opinion of the court of appeals, sitting *en banc* (Appendix A, *infra*, pp. 9-10), is not yet reported. The opinion of the panel (Appendix B, *infra*, pp. 11-22) is reported at 416 F. 2d 920.

JURISDICTION

The judgments of the panel (Appendix D, *infra*, pp. 25-26) were entered on September 17, 1969. A

petition for a rehearing *en banc* was granted on October 2, 1969. The opinion and judgment of the court *en banc* was entered on March 30, 1970 (Appendix C, *infra*, p. 23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, should be applied retroactively so as to require, on collateral attack, vacation of convictions for conspiring to violate and violating the federal wagering tax laws, based on a guilty plea entered three years before those decisions were rendered.

STATEMENT

On January 18, 1965, respondent entered a plea of guilty to one count of a twelve-count indictment returned in the Southern District of Texas on September 18, 1964, which charged him with evading payment of federal taxes owed on wagering for the month of November 1963, in violation of 26 U.S.C. 4403, 7201. Thereafter, the remaining counts were dismissed. The second conviction, similarly after a plea of guilty, was upon a one-count information (returned on January 18, 1965) charging respondent and six others with conspiring wilfully from March 1, 1959, to January 31, 1964, to fail to pay the excise tax on wagering due from respondent under 26 U.S.C. 4401, in violation of 26 U.S.C. 7203. On February 1, 1965, respondent was sentenced to imprisonment for six months and fined $10,000 on the conspiracy count;

on the evasion count he received a cumulative sentence of five months' probation and a $10,000 fine.

On January 29, 1968, this Court held in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, that the privilege against self-incrimination provided a complete defense to a criminal prosecution for failing to register and pay the wagering occupational and excise taxes. Both those cases arose on direct appeal. Two weeks later respondent filed with the sentencing court a motion to vacate and set aside his convictions, relying solely upon the *Marchetti* and *Grosso* holdings. The district court denied the motion, holding that the wagering tax statutes had not been held unconstitutional in *Marchetti-Grosso*, and that respondent's pleas of guilty, knowingly and voluntarily entered, served as a waiver of any defense based upon the privilege against self-incrimination. A panel of the Court of Appeals for the Fifth Circuit reversed. It disagreed with the view that respondent had waived his self-incrimination defense by pleading guilty, concluding that such a plea waived only those rights and privileges which were known to the defendant at the time of the plea, and that respondent could not have known of his right to invoke the privilege against self-incrimination under the *Marchetti-Grosso* decisions because those cases had not been decided when his pleas had been entered. The panel also reviewed the criteria established by this Court for determining whether a decision should be given retroactive or prospective application, and concluded that *Marchetti-Grosso* fell within the class of cases to be given retroactive effect

and that respondent was therefore entitled to the benefit of those decisions (see App. 18-22). On March 30, 1970, the court of appeals, sitting *en banc*, affirmed the panel's holding as to retroactivity but withdrew as unnecessary the discussion of waiver and its effect on the guilty pleas (see App. 9-10).

REASONS FOR GRANTING THE WRIT

1. This case is one of a series arising in the lower courts involving the retroactivity of *Marchetti-Grosso*. While there has been general agreement in the courts of appeals that these decisions are applicable to cases pending on direct appeal at the time they were decided (cf. *Grosso* v. *United States*, *supra*, 390 U.S. at 70-71), there have been conflicting conclusions as to their application to convictions which have become final. Thus, the decision of the Fifth Circuit in this case is squarely contrary to the ruling of the Sixth Circuit in *Graham* v. *United States*, 407 F. 2d 1313, pending on petition for a writ of certiorari, No. 294 Misc., this Term (see App. 21), and also conflicts with the decision of the Seventh Circuit in *Mackey* v. *United States*, 411 F. 2d 504, certiorari granted, 396 U.S. 954 (No. 529, this Term).[1] There is a similar widespread conflict in the circuits with regard to the question of the retroactive application of the self-incrimination rulings in *Haynes* v. *United States*, 390 U.S. 85 (possession of unregistered firearms), and *Leary*

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[1] See also *United States* v. *United States Coin and Currency*, certiorari granted, 393 U.S. 949, restored for reargument, 395 U.S. 918 (No. 8, this Term).

v. *United States*, 395 U.S. 6 (purchasing marihuana without an order form).[2]

While the question of the retroactivity of the wagering tax provisions is presently before the Court in *Mackey*, it is there presented in a different context than here and, in view of the other issues in that case, the Court's decision in *Mackey* might well not be dis-

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[2] As to decisions involving the retroactivity of *Haynes* and the provisions under the firearms statute, compare *United States* v. *Miller*, 406 F. 2d 1100 (C.A. 4); *United States* v. *Michael*, No. 17,352 (C.A. 7), decided April 3, 1970; and *Meadows* v. *United States*, No. 24,756 (C.A. 9), decided December 23, 1969, pending on petition for a writ of certiorari, No. 1217, this Term, according retroactive application to *Haynes*, with *Decker* v. *United States*, No. 19,846 (C.A. 6), decided March 20, 1970; *Desimone* v. *United States*, 303 F. Supp. 406 (D. Conn.); *Stoney* v. *United States*, 302 F. Supp. 145 (E.D. Mo.); *Horton* v. *United States*, 300 F. Supp. 1332 (D. Conn.), holding against its retroactivity.

There is also a differing view in the circuits as to the retroactive application of the privilege aspect of *Leary*. See *Santos* v. *United States*, 417 F. 2d 340 (C.A. 7), vacated and remanded on other grounds, February 24, 1970, No. 861, this Term; *Rowell* v. *United States*, 415 F. 2d 300 (C.A. 8), vacated and remanded on other grounds, April 27, 1970, No. 863, this Term. For a contrary view, see *United States* v. *Scardino*, 414 F. 2d 925 (C.A. 5), *Ramseur* v. *United States*, No. 18,824 (C.A. 6), decided April 8, 1970. See also *Rivera-Vargas* v. *United States*, 307 F. Supp. 1075 (D. Puerto Rico) and *Jones* v. *United States*, 305 F. Supp. 465 (C.D. Cal.), denying retroactivity; contra, *United States* v. *King*, 307 F. Supp. 217 (S.D. Cal.) (*dictum*).

The Tenth Circuit has so far rejected all claims that *Marchetti-Grosso-Haynes-Leary* apply retroactively where the defense of self-incrimination had not been made at trial. See *Whaley* v. *United States*, 394 F. 2d 399; *Eby* v. *United States*, 415 F. 2d 319; *Sepulveda* v. *United States*, 415 F. 2d 321; *United States* v. *Carlisle*, 303 F. Supp. 627 (W.D. Okla.). This ruling applies to guilty plea (*Eby*) and non-guilty plea (*Sepulveda*) cases alike.

positive of the straightforward and direct issue presented in this case. The same is true of *United States* v. *United States Coin and Currency*, No. 8, this Term (see note 1, *supra*), where the question involves the application of *Marchetti-Grosso* to seizures of property used in violation of the wagering tax laws for purposes of forfeiture. In short, unless this Court were squarely to rule in *Mackey* or *United States Coin and Currency* that the holdings in *Marchetti-Grosso* were not retroactive, those cases would not necessarily resolve the question posed in this case or the existing conflict among circuits. The question is an important and recurring one—as the volume of litigation thereon shows—and thus warrants resolution by this Court.

2. The instant case raises the additional question of the effect of a voluntarily and knowingly entered plea of guilty made long before *Marchetti-Grosso* were decided. In our view, even assuming *arguendo* that *Marchetti-Grosso* were found fully retroactive, that would not end the inquiry in the situation posed here.[3] The question would still remain as to whether the "claim of the privilege was timely and whether it was waived." *Leary* v. *United States*, *supra*, 395 U.S. at 27; *United States* v. *Covington*, 395 U.S. 57, 59. Our position has consistently been that a guilty plea

[3] Apparently, the *en banc* court in this case thought it would since it found unnecessary any discussion of waiver in the panel opinion (see App. 10). Presumably, it found that so long as *Marchetti-Grosso* are given full retroactive effect, no argument remains that such a ruling does not overturn a knowing and voluntarily entered guilty plea. As the discussion above indicates, we do not share this view.

properly entered serves as a waiver of all non-jurisdictional defenses, "including (a defendant's) privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers." *McCarthy* v. *United States*, 394 U.S. 459, 466; *Boykin* v. *Alabama*, 395 U.S. 238. Accordingly, where the record shows that no such defense was asserted prior to the plea and there was no reason why the defendant could not have raised the defense, a sound argument can be made that the failure of the record to show affirmatively that counsel considered the defense and elected not to assert it does in itself make a guilty plea "unknowingly" entered. The fact that the defense of the Fifth Amendment privilege, or any defense, was first recognized as valid after the guilty plea was entered should not be a controlling consideration. Indeed, that is the thrust of *Brady* v. *United States*, decided May 4, 1970, No. 270, this Term (slip op. p. 15); see also *McMann* v. *Richardson*, decided May 4, 1970, No. 153, this Term. This, we submit, is particularly true in applying the notion of "untimeliness" referred to in *Leary*.

What effect, if any, a plea of guilty has in cases where retroactive application of *Marchetti*, *Grosso*, *Haynes* or *Leary* is urged has also met with conflicting results in the lower courts. The Fourth and Ninth Circuits have found that a guilty plea did not bar relief if this Court's decisions warranted retroactive application (*Miller* and *Meadows*, *supra*). Different panels of the Seventh Circuit appear to disagree on the question. Compare *United States* v. *Michael*, *supra*, with *Gillespie* v. *United States*, 409 F. 2d 511

(C.A. 7), pending on petition for a writ of certiorari, No. 390 Misc., this Term.[4] In sum, this question is so closely connected to the issue of retroactivity, and the decisions of the lower courts have been so conflicting that guidance is necessary from this Court to resolve the issue. This is particularly so in the event the Court determines that the class of decisions dealing with the Fifth Amendment privilege as a defense to violating certain taxing or regulatory statutes should be applied retroactively. We therefore suggest that it might be appropriate to defer action on this petition to await decisions in the retroactivity cases now pending (*e.g.*, *United States Coin and Currency and Mackey*). Depending on the rulings in those cases, the present case may be disposed of summarily or may require more extended consideration on the retroactivity and/or guilty plea questions.

Respectfully submitted.

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MAY 1970.

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[4] A district court in another circuit has held the plea of guilty to constitute a waiver. *Bannister* v. *United States*, 300 F. Supp. 174 (W.D. Pa.). See *Masterson* v. *United States*, 293 F. Supp. 787 (D. Del.); see also our briefs opposing certiorari in *Gillespie*, *supra*, *Drotar* v. *United States*, No. 1450 Misc., this Term, *Miller* v. *United States*, No. 106, this Term, certiorari denied, 396 U.S. 854, and our petition for certiorari in *Meadows*, *supra*.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26316

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

JOSEPH P. LUCIA, DEFENDANT-APPELLANT

No. 26317

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

JOSEPH P. LUCIA, DEFENDANT-APPELLANT

Appeals from the United States District Court for the Southern District of Texas

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(March 30, 1970)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

I.

The Court en banc is unanimously of the opinion that the panel, 416 F.2d 920, correctly decided that

Marchetti v. *United States*, 1968, 390 U.S. 39, 88 S.Ct. 617, 19 L.Ed.2d 889 and *Grosso* v. *United States*, 1968, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 should be applied retroactively. See *Meadows* v. *United States*, 9 Cir. 1969, F.2d (citing (*Lucia* with approval); *Miller* v. *United States*, 4 Cir. 1969, 406 F.2d 1100. The Court therefore affirms the judgment of the panel.

The Court also finds that there is no necessary conflict between *Lucia* and *United States* v. *Scardino*, 5 Cir. 1969, F.2d .

II.

A majority of the Court concludes that because of the holding on the retroactive effect of *Marchetti* and *Grosso* there is no need to discuss waiver. Section I of the panel's decision is therefore withdrawn.

Judge Wisdom takes the position that the Court must dispose of the question of waiver before reaching the question of the retroactivity of *Marchetti* and *Grosso*. He adheres to the view the panel expressed: Ordinarily a plea of guilty waives defenses and privileges; there was no waiver in this case, for Lucia could not understandingly waive his privilege against self-incrimination in a prosecution for violation of the federal laws taxing illegal wagers, since at the time he pleaded guilty the Supreme Court had not decided *Marchetti* and *Grosso*.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26316

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

JOSEPH P. LUCIA, DEFENDANT-APPELLANT

No. 26317

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

JOSEPH P. LUCIA, DEFENDANT-APPELLANT

Appeals from the United States District Court for the Southern District of Texas

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(September 17, 1969)

Before WISDOM and GODBOLD, Circuit Judges, and HUGHES, District Judge.

WISDOM, Circuit Judge: This appeal turns upon whether the Supreme Court's decisions in *Marchetti* v. *United States*, 1968, 390 U.S. 39, 88 S.Ct. 687, 19 L.Ed.2d 889, and *Grosso* v. *United States*, 1968, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906, should be applied retroactively. We hold that they should be ap-

plied retroactively and reverse the judgment of the district court.

Joseph P. Lucia was indicted in the Southern District of Texas September 18, 1964, on various counts for violation of provisions of the federal statutory scheme for taxing illegal wagers. Lucia first pleaded not guilty to all counts of the indictment, but at his rearraignment January 18, 1965, he changed his plea to guilty to Count 12 of the indictment. That count charged him with attempting to evade the excise tax on wagering (1) by failing to file the required Form 730 (Tax on Wagering Returns), (2) by failing to keep certain records as required by 26 U.S.C. § 4403 and (3) by various acts of concealment, all in violation of 26 U.S.C. § 7201. The court dismissed the remaining counts.

That same day the United States Attorney filed a criminal information charging Lucia and others with conspiring willfully to fail to pay the federal excise tax on gambling, imposed by 26 U.S.C. § 4401, in violation of 18 U.S.C. § 371. The defendant again pleaded guilty. The court sentenced him to consecutive terms of six months on the conspiracy charge and five years on the evasion charge. It also imposed a $10,000 fine on each count. The court suspended the five-year sentence and put Lucia on probation. He has paid the fine and served the remaining six-month sentence.

In January 1968 the Supreme Court decided *Marchetti* and *Grosso*, cases holding that a defendant's assertion of the privilege against self-incrimination under the Fifth Amendment is a bar to prosecution for violation of the federal laws taxing illegal wagers. Relying on these cases, Lucia filed a motion, in the nature of a writ of error coram nobis, to vacate and set aside judgments and sentences below. Lucia

pointed out that although he had completed his sentence, he still remained on probation and was continuing to suffer certain civil disabilities as a result of his conviction. The district court held that *Marchetti* and *Grosso* had not voided the statutes under which Lucia had been convicted, but had merely provided a defense to them; a defense, the court said, that could not be applied retroactively. The court held also that Lucia's guilty plea waived all defenses, including any defense based upon his privilege against self-incrimination. This appeal followed the district court's denial of Lucia's motion.

I.

We disagree with the district court's holding that Lucia waived his self-incrimination defense when he pleaded guilty. The accepted definition of waiver, adopted by the Supreme Court in *Johnson* v. *Zerbst*, 1938, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466, is "an intentional relinquishment or abandonment of a known right or privilege". The courts will not accept an accused's loss of a constitutional right when he does not understand what he is losing. *Miranda* v. *Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 1602; *Boykin* v. *Alabama*, 1969, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274; also see Fed. R. Crim. P. 11. In *Boykin* the Court noted that among the "federal constitutional rights . . . involved in a waiver that takes place when a plea of guilty is entered . . . is the privilege against compulsory self-incrimination." The Court pointed out that the "requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation". As long ago as the decision in *Carnley* v. *Cochran*, 1962, 369 U.S. 506, 82 S.Ct. 884,

8 L.Ed.2d 70, the Supreme Court had held: "Presuming waiver from a silent record is impermissible."

Lucia had no knowledge of his right against self-incrimination under the *Grosso* and *Marchetti* rule, for, at the time, those cases had not been decided. In earlier cases, *United States* v. *Kahriger*, 1953, 345 U.S. 22, 73 S.Ct. 510, 98 L.Ed. 754, and *Lewis* v. *United States*, 1955, 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed. 475, the Supreme Court had rejected the contention that prosecution under the federal gambling tax scheme violates the Fifth Amendment. Lucia, therefore, could not have "knowingly and intentionally" waived his privilege against prosecution: that privilege did not exist. *Johnson* v. *Zerbst* and *Miranda* v. *Arizona* invalidate the waiver of rights that the defendant's own inexperience or ignorance prevent him from knowing. By logical extension, these decisions rule out all the more strongly the waiver of a right, such as Lucia's, that is unknown not because of any infirmity on the defendant's part, but because it is unknowable.

This is a dictate of common sense. Precedent supports it. The Supreme Court has repeatedly held that a party cannot be said to waive a right that was judicially created *after* the supposed waiver. *Curtis Publishing Co.* v. *Butts*, 1967, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, a *civil* suit for libel, was tried before the Supreme Court's decision in *New York Times Co.* v. *Sullivan*, 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, which recognized for the first time certain First Amendment defenses against libel claims. On appeal, the defendant raised a *New York Times* defense, but the court concluded that the right had been waived. The Supreme Court reversed:

> "As our dispositions of Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597, and other

> cases involving constitutional questions indicate, the mere failure to interpose such a defense *prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground.* Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at the proper time, [citing case] but an effective waiver must, as was said in Johnson v. Zerbst, be one of a 'known right or privilege'." 388 U.S. at 143, 87 S.Ct. at 1985, 18 L.Ed.2d at 1104. (Emphasis added.)

If Curtis, a defendant in a *civil* case, did not waive an unannounced constitutional defense by his failure to raise it at trial, Lucia, an accused in a *criminal* case, did not waive his constitutional defense.

Grosso compels the same conclusion. The defendant there was charged with failure to pay both the occupational tax on gambling and the excise tax on gambling proceeds. At trial *Grosso* raised constitutional objections to the occupational-tax counts, but not to the excise-tax counts. The Supreme Court reversed, nonetheless, on *all* counts:

> "Given the decisions of this Court in Kahriger and Lewis, supra, which were on the books at the time of petitioner's trial, and left untouched by Albertson v. SACB, 382 U.S. 70, 88 S.Ct. 194, 15 L.Ed.2d 165, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege." 390 U.S. at 71, 88 S.Ct. at 715, 19 L.Ed.2d at 913-914.

The United States contends that even if the waiver must be knowing, and if waiver of specific defenses at trial assumes knowledge of their existence, there is something special about a guilty plea that makes

the possible defenses irretrievable: "a plea of guilty waives all defenses and procedural defects which are not jurisdictonal". That statement is true only when the defendant is able to assess the various defenses available to him, as well as the consequences of submitting to conviction. Otherwise, the requirements integral to accepting guilty pleas make no sense. See Fed.R.Crim. P. 11; *McCarthy* v. *United States*, 1969, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418; *Von Moltke* v. *Giles*, 1947, 332 U.S. 708, 68 S.C. 316, 92 L.Ed. 309. A plea of guilty is an abbreviated way of going down the list of possible defenses and privileges—right to counsel, jury trial, confrontation of witnesses, self-incrimination, etc.—and waiving each one.[1] The plea represents the relinquishment of a bundle of defenses, and has no magical implications with regard to finality beyond that. The whole does not exceed the sum of its parts. If one of the component waivers was ineffective because of the inadequate knowledge upon which it was made, the defect is not cured by virtue of the fact that the waiver was made implicitly, as part of a guilty plea.

In *Haynes* v. *United States*, 1968, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923, the Supreme Court upheld the privilege against self-incrimination as a valid defense to prosecution under the National Firearms

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[1] See United States ex rel. Rogers v. Warden of Attica State Prison, 2 Cir. 1967, 381 F.2d 209, 213:

> "[W]e must be wary of blindly applying . . . [the guilty plea waiver] doctrine to every case involving such a plea. There is nothing inherent in the nature of plea of guilty which ipso facto renders it a waiver of a defendant's constitutional claims. Rather, waiver is presumed because ordinarily such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state procedures . . ."

Act, under a rationale similar to that in *Marchetti*. Haynes had pleaded guilty. The Supreme Court in a footnote pointed out the absence of waiver: "Petitioner's plea of guilty did not, of course, waive his previous claim of constitutional privilege." 390 U.S. at 87, 88 S.Ct. at 725, 19 L.Ed.2d at 926.

Several post-*Marchetti* and *Grosso* decisions have rejected arguments that failure to assert the constitutional defense guaranteed by the Fifth Amendment, constituted a waiver of the defendant's constitutional rights. In *United States* v. *Manfredonia*, 2 Cir. 1968, 391 F.2d 229, the court said:

> "Since in *Marchetti* the privilege had been asserted at the trial, the government argues here that the appellants' failure to assert the privilege against self-incrimination as a defense at trial amounted to a waiver of protection . . . . At the time of the trial of these appellants the wagering statutes were valid and the decisions in Lewis v. United States, 1955, 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed 475 and United States v. Kahriger, 1952, 345 U.S. 22, 73 S.Ct. 510, 97 L.Ed. 754 were still applicable. There is no reason to suspect that appellants knowingly waived their Fifth Amendment privilege at trial. These defendants should not be required to anticipate the Supreme Court action overruling Lewis and Kahriger or compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of an overriding decision. We believe the effect of the Supreme Court decisions in *Marchetti* and *Grosso* is to prevent enforcement of the wagering statutes as they are now designed because of the 'substantiality of the risks of incrimination.' " 391 F.2d at 230.

Accord: *Harris* v. *United States*, 8 Cir. 1968, 390 F.2d 616; *United States* v. *Lookretis*, 7 Cir. 1968, 398 F.2d 64. See also *United States* v. *Butler*, 5 Cir. Nos. 22,274 and 23,055, aff'd 361 F.2d 266; vacated and remanded for further consideration in light of *Marchetti* and *Grosso; De Cesare* v. *United States*, 1968, 390 U.S. 200, 88 S.Ct. 900, 19 L.Ed.2d 1026. Although these cases were all direct appeals from judgments which had not become final, the rationale on which they rest is applicable to the case before the Court.

We conclude that Lucia's failure to raise the self-incrimination defense in the trial court and his plea of guilty did not prevent his raising the point in the present action. *See United States* v. *Miller*, 4 Cir. 1969, 406 F.2d 1100.

II.

The test for deciding the retroactivity of new constitutional standards of criminal procedure has been progressively developed in a recent line of Supreme Court decision.[2] *Linkletter* v. *Walker*, 1965, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601; *Tehan* v. *Shott*, 1966, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453;

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[2] Commentators have been active in this area. See Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio, 110 U. Pa. L. Rev. 650 (1962); Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 U. Va. L. Rev. 201 (1965); Meador, Habeas Corpus and the "Retroactivity" Illusion, 50 U. Va. L. Rev. 1115 (1964); Mishkin, The Supreme Court, 1964 Term Foreward: The High Court, the Great Writ and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965); Schaeffer, The Control of "Sunbursts"; Techniques of Prospective Overruling, 42 N.Y.U.L. Rev. 631 (1967); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719 (1966).

Johnson v. *New Jersey*, 1966, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882; *Stovall* v. *Denno*, 1967, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199; *Desist* v. *United States*, 1968, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248. *Stovall* sets out the formula to be applied in each case:

> "The criteria guiding resolution of the questions implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 388 U.S. at 297, 87 S.Ct. at 1970, 18 L.Ed.2d at 1203.

"Foremost among these factors is the purpose to be served by the new court rule." *Desist* v. *United States*, 394 U.S. at 249. As the Court pointed out in *Desist* "it was principally the Court's assessment of the purpose of *Mapp* v. *Ohio*, 1961, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, which led it in *Linkletter* to deny those finally convicted the benefit of *Mapp's* extension of the exclusionary rule to the states." 394 U.S. at 249. The exclusionary rule is "based on the necessity for an effective deterrent to illegal police action". When the court has made its rulings prospective only, it has done so on the rationale that the damage caused by the improper governmental behavior will not be undone or repaired by reversing existing convictions. Thus in *Linkletter*, the defendant's privacy had already been breached by an illegal search. In *Mapp* v. *Ohio*, the fruits of such searches were held inadmissible at trial. The deterrent purpose of the *Mapp* rule would not "be advanced by making the rule retrospective. The misconduct of the police has already occurred and will not be corected

by releasing the prisoners involved". *Linkletter*, 381 U.S. at 637.

In contrast, new constitutional rules going to the fundamental fairness of a trial, the accuracy and reliability of the fact-finding process, rules that substantially reduce the likelihood that an innocent person will be convicted, have received retroactive application. For example, in *Bruton* v. *United States*, 1968, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, overturning *Delli Paoli* v. *United States*, 1957, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278, the court held that the admission of a defendant's extra-judicial confession implicating a co-defendant violates the co-defendant's right to confront his accuser under the Sixth Amendment. In *Roberts* v. *Russell*, 1968, 392 U.S. 293, 295, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100, 1103, the Court held that "[this] constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined." The purpose of the new *Bruton* rule, greater accuracy in guilt-determination, applied to past as well as future trials, and the Court therefore extended *Bruton* retroactively.

There is no doubt that at the time of Lucia's arrest, indictment, and trial, the prosecution relied on the state of the law as represented by *United States* v. *Kahriger* and *Lewis* v. *United States*. The *Stovall* factor of reliance therefore weighs against retroactive application of the *Marchetti-Grosso* rule. We feel, however, that we should give greater weight to the purpose of *Marchetti* and *Grosso* [3] than to the factor of reliance. The purpose of the *Marchetti-Grosso* rule is to protect the constitutional privilege against

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[3] See Desist v. United States, 1969, 394 U.S. 244, 249n.14, 89 S.Ct. 1030, 22 L.Ed.2d 248.

a statutory system jeopardizing it. The purpose is not to deter unlawful police action. Nor is it to sharpen the fact-finding process. It does not involve guilt or innocence. Indeed, "the constitutional privilege was intended to shield the guilty and the imprudent as well as the innocent and foresighted . . ." *Marchetti* 390 U.S. at 51. The Supreme Court concluded that the objective of the statute—to force disclosure by punishing silence—was improper. Since the aim of the statute is constitutionally impermissible, courts should not continue to enforce its sanctions. Stated in terms of balancing *Stovall* factors, we consider the preservation of the Fifth Amendment privilege against self-incrimination more imimportant than the fact that the government relied on earlier—now overruled—decisions. We disagree, therefore, with the conclusions the Sixth Circuit reached in *Graham* v. *United States* 6 Cir. 1969, 407 F.2d 1313.

The third *Stovall* factor is the extent of the burden on the administration of justice that would result from retroactivity. The number of offenders presently in jail under the federal gambling tax laws must be small indeed. The government acknowledged in its brief that no one had been prosecuted under the wagering laws since the Supreme Court decided *Marchetti* and *Grosso*. According to the brief, 17 persons of the 1262 convicted under these laws in 1965 and 1966 received prison terms longer than one year. We do not have to fear a wholesale emptying of the jails. Nor will the courts and United States Attorneys be taxed with retrying old offenses on the basis of stale evidence. In short, the practical effects of retroactivity in this case will be minimal.

Marchetti and *Grosso* rest upon the constitutional principle that a man's dignity is violated when he is

forced into the dilemma of either speaking against himself or suffering criminal sanctions. Lucia's dignity has already been violated, since the government has long since indicted, tried, and punished him. In that sense the harm to him cannot be repaired, and he stands in *Linkletter's* position. Unlike *Linkletter*, however, he stands convicted of no act that the government now can legitimately punish.

The judgment of the district court is REVERSED and the cause is REMANDED for disposition consistent with this opinion.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1969

No. 26316
No. 26317

D. C. Docket Nos. CR-64-H-151 &
CR-65-H-9

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

JOSEPH P. LUCIA, DEFENDANT-APPELLANT

Appeals from the United States District Court for the Southern District of Texas

---

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN and CLARK, Circuit Judges.

JUDGMENT ON REHEARING

IT IS ORDERED that the judgment entered by a panel of this Court on September 17, 1969, reversing the judgment of the District Court in this cause is affirmed by the Court en banc, but Section I of the panel's decision is withdrawn.

WISDOM, Circuit Judge, dissents in part.

March 30, 1970

Issued as Mandate:

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1968

No. 26316

D. C. Docket No. 64-H-151-Criminal

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

JOSEPH P. LUCIA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Texas

---

Before WISDOM and GODBOLD, Circuit Judges, and HUGHES, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for disposition consistent with the opinions of this Court.

September 17, 1969

Issued as Mandate:

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1968

No. 26317

D. C. Docket No. 65-H-9-Criminal

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

JOSEPH P. LUCIA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Texas

---

Before WISDOM and GODBOLD, Circuit Judges, and HUGHES, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for disposition consistent with the opinions of this Court.

September 17, 1969

Issued as Mandate:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 186

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSEPH P. LUCIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The *per curiam* opinion of the court of appeals sitting *en banc* is reported at 423 F.2d 679. The opinion of the panel, which it affirmed, is reported at 416 F.2d 920.

STATEMENT

Respondent received a five-year, rather than a five-month, probated sentence for violation of 26 U.S.C. § 7201. He completed his five-year probationary period and was discharged from probation on July 5, 1970. He had previously served his six-month jail sentence and paid his fines

of $20,000. With the exception indicated, respondent accepts petitioner's statement.

ARGUMENT

(1) Marchetti and Grosso Should Be Retroactively Applied at Least to Criminal Convictions for Violation of the Wagering Tax Scheme

This Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39 (1968), and *Grosso* v. *United States,* 390 U.S. 62 (1968), raise questions of complexity as to the manner in which the Fifth Amendment defense there recognized should be applied in civil forfeiture cases;[1] civil wagering tax cases;[2] and non-wagering tax cases such as income tax fraud proceedings.[3] Petitioner has recognized that these causes entail different considerations from criminal convictions under the wagering tax scheme.[4] Cases are pending before the Court that provide adequate vehicles for the Court to resolve these problems.

This case, however, involves only the relatively narrow problem whether criminal convictions, admittedly obtained

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[1] United States v. United States Coin and Currency, 393 F.2d 499 (7th Cir.), *cert. granted,* 393 U.S. 949 (1968), *restored for reargument,* 395 U.S. 918 (1969) (No. 8, 1969 Term; renumbered No. 5, 1970 Term); Dean v. United States, 392 F.2d 672 (6th Cir. 1968), *petition for cert. filed,* 37 U.S.L.W. 3139 (U.S. Oct. 8, 1968) (No. 619, 1968 Term; renumbered No. 12, 1969 Term; renumbered No. 8, 1970 Term).

[2] Washington v. United States, 402 F.2d 3 (4th Cir. 1968), *petition for cert. filed,* 37 U.S.L.W. 3221 (U.S. Dec. 13, 1968) (No. 831, 1968 Term; renumbered No. 22, 1969 Term; renumbered No. 11, 1970 Term).

[3] Mackey v. United States, 411 F.2d 504 (7th Cir.), *cert. granted,* 396 U.S. 954 (1969) (No. 529, 1969 Term; renumbered No. 36, 1970 Term).

[4] Brief for Petitioner at 29-30, United States v. United States Coin and Currency, *supra.*

in derogation of the Fifth Amendment rights recognized in *Marchetti* and *Grosso*, should be allowed to stand because they were obtained before the decisions in *Marchetti* and *Grosso* were handed down. We submit that the 13 judges of the United States Court of Appeals for the Fifth Circuit scrupulously and persuasively followed the criteria annuciated by this Court for determining retroactivity. *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Halliday* v. *United States*, 394 U.S. 831, 832 (1969). We have sought to demonstrate the correctness of the Fifth Circuit's ruling on retroactivity in the Brief of Joseph P. Lucia as *Amicus Curiae*, *United States* v. *United States Coin and Currency*, *cert. granted*, 393 U.S. 949 (1968), *restored for reargument*, 395 U.S. 918 (1969) (No. 8, 1969 Term; renumbered No. 5, 1970 Term), and respectfully refer the Court to that brief.

The Sixth Circuit opinion in *Graham* v. *United States*, 407 F.2d 1313 (6th Cir. 1969), *petition for cert. filed*, (May 17, 1969) (No. 294 Misc., 1969 Term; renumbered No. 5040, 1970 Term), does not survive comparison. The Sixth Circuit justifies its result in a single sentence that states in a wholly conclusory form that the three criteria held critical by this Court point toward prospective application.

Mackey v. *United States*, 411 F.2d 504 (7th Cir.), *cert. granted*, 396 U.S. 954 (1969) (No. 529, 1969 Term; renumbered No. 36, 1970 Term), cannot fairly be said to conflict with *Lucia*. There was no charge of violation of the wagering tax scheme, but rather of evasion of income taxes. 411 F.2d at 509. The Seventh Circuit specifically disavowed any intent to decide the question of retroactive application to criminal wagering tax violations:

> Whether the ruling of *Marchetti* and *Grosso* should be applied retroactively to defendants in the situation of Kahriger and Lewis themselves [citation omitted], who have claimed the privilege and have been convicted

> of failure to file the returns, presents considerations not before us, since in such cases recognition of the privilege would negate the very offense for which the defendants are imprisoned.

Id. at 509.

Petitioner seems to argue that the question of the retroactive application of *Marchetti* and *Grosso* is the same as the question of the retroactive application of *Haynes* v. *United States,* 390 U.S. 85 (1968) (possession of unregistered firearms) and the retroactive application of *Leary* v. *United States,* 395 U.S. 6 (1969) (purchasing marihuana without an order form). If so, petitioner distorts this Court's three-fold test of retroactivity for newly adopted constitutional rulings, recently reiterated in *Halliday,* which requires consideration of: "(1) the purpose of the new rule; (2) the extent of reliance upon the old rule; and (3) the effect retroactive application would have upon the administration of justice." *Halliday* v. *United States,* 394 U.S. at 832.

While concededly the purpose of the rule in *Marchetti-Grosso, Haynes* and *Leary* is the same, this is no indication that the application of the second and third criteria would give the same result. It is quite conceivable that, although *Marchetti-Grosso* should be applied retroactively, either *Haynes* or *Leary* or both should not. Thus a conflict in the circuits over the retroactivity of *Haynes* and *Leary* is no basis for granting the writ in this cause and it is not necessary, or appropriate, to consider the retroactivity of *Marchetti-Grosso, Haynes* and *Leary* as a unitary question.

We suggest, therefore, that the limited question involved in *Lucia* and *Graham* does not merit plenary consideration by the Court. Certiorari should be denied in *Lucia,* and *Graham* should be summarily reversed.

(2) There Is No Legitimate Issue of Waiver in This Cause

Petitioner now regards the issue of waiver as an "additional question" to that of retroactivity and disagrees with what it assumes to have been the view of the Fifth Circuit, sitting *en banc*, that if *Marchetti* and *Grosso* are given full retroactive effect, there is no argument for failing to give relief to a person who pleaded guilty before they were decided. (Petition, p. 6 n.3.) This has not always been the view of petitioner. Although it succeeded in the district court on the basis of waiver, and at one time argued waiver to the Fifth Circuit, in its presentation to the *en banc* court petitioner was at pains to say that the question of retroactivity was "the controlling question" (Appellee's Supplemental Brief, p. 3) and that:

> the question of retroactivity should be considered—and decided—upon the basis of policy questions which the concept of waiver will tend not to illuminate but to obscure.

Id. at 4. Thus petitioner now seeks to win reversal of the Fifth Circuit on the basis of an argument it told the court below it ought not to consider.[5]

The sound perception was that advanced by petitioner in the court below, rather than the one it puts forward here. The impact on past judgments of changes in the law should be squarely confronted in terms of the three-fold test of retroactivity reiterated in *Halliday*.

To hold that the new rules are retroactive, but that one who pleaded guilty when the rules were different has waived them, would obscure rather than illuminate the policy considerations that are properly applicable to an issue of that kind. It would undermine the clear-cut test that there must

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[5] *Cf.* Dunigan v. United States, 274 U.S. 195, 200 (1927); Husty v. United States, 282 U.S. 694, 701-702 (1931); California v. Taylor, 353 U.S. 553, 557 n.2 (1957); Lawn v. United States, 355 U.S. 339, 362 n.16 (1958).

have been an "intentional relinquishment or abandonment of a known right," *Barber* v. *Page,* 390 U.S. 719, 725 (1968), by fictive talk about waiver of a right that could not have been known so long as *Kahriger*[6] and *Lewis*[7] stood. And it would lead to the anomaly that one who conceded that, under the law as it then stood, he was guilty would get no benefit from the retroactive rule, while one who denied his guilt, though he was found to have been guilty, would now be entitled to have his conviction expunged. Surely constitutional rights, satisfying all other requisites for retroactive application, do not turn on such an arbitrary touchstone.

Nor is the argument for separate consideration of waiver advanced by pointing out that a plea of guilty waives, among other things, the privilege against compulsory self-incrimination. Respondent's plea was an intentional and knowing relinquishment of his constitutional privilege not to be convicted out of his own mouth. It was not a waiver of his privilege not to incriminate himself of a variety of offenses by paying the tax on wagers:

> The aspect of the self-incrimination privilege which was involved in *Marchetti,* and which petitioner asserts here, is not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act. . . . His admission at trial that he had indeed failed to comply with the statute was perfectly consistent with the claim that that omission was excused by the privilege. Hence, it could not amount to a waiver of that claim.

Leary v. *United States,* 395 U.S. 6, 28 (1969).

Between them, *Marchetti, Grosso* and *Haynes* seem dispositive of petitioner's argument that Mr. Lucia's plea of

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[6] United States v. Kahriger, 345 U.S. 22 (1953).
[7] Lewis v. United States, 348 U.S. 419 (1955).

guilty amounts to a waiver depriving him of the benefit of *Marchetti* and *Grosso.*

In *Marchetti,* the constitutional objection was raised for the first time on a motion to arrest judgment. 390 U.S. at 41-42. *See also* Brief for Petitioner, *Marchetti* v. *United States,* (No. 38, 1966 Term; renumbered No. 2, 1967 Term), p. 3. The relief to which this Court held that Marchetti was entitled was available only "if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Rule 34, Fed. R. Crim. P. Thus, *Marchetti* itself stands for the proposition that the Fifth Amendment defense it recognized does not fall, as petitioner suggests, into the category of non-jurisdictional defenses inevitably waived by entry of a guilty plea or by failure to assert at trial. *Compare United States* v. *Sisson,* 90 Sup. Ct. 2117 (1970) (illustrating the narrowness of the category of defenses properly raised in arrest of judgment).

In *Grosso,* no objection was raised to the counts of the indictment based on failure to pay the occupational tax. Indeed, at the first oral argument of the *Grosso* case, Justice Stewart asked counsel for Grosso why he was not challenging the occupational tax counts and was told that the record would not permit such a challenge since the objection had not been made below. Nevertheless, this Court ordered Grosso's conviction reversed on the occupational tax counts, as well as the excise tax counts, saying:

> Given the decisions of this court in *Kahriger* and *Lewis, supra,* which were on the books at the time of petitioner's trial, and left untouched by *Albertson* v. *SACB, supra,* we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege.

390 U.S. at 71.

In *Haynes* the defendant had entered a plea of guilty after the trial court denied a motion to dismiss based on the claim on the statute under which he was charged was "unconstitutional." In spite of the guilty plea, the court did not find it necessary to deal with the issue of waiver in the text of its opinion, relegating resolution of the question to the following footnote:

> Petitioner's plea of guilty did not, of course, waive his previous claim of the constitutional privilege. See, *e.g., United States* v. *Ury,* 106 F.2d 28.

390 U.S. at 87 n.2.

Haynes is simply incompatible with the petitioner's position that respondent's pleas of guilty constituted a waiver of his Fifth Amendment defense. Petitioner may not soften the effect of *Haynes* by pointing out the prior assertion by the defendant of the "unconstitutionality" of the statute involved in that case. Such a factual distinction requires the illogical assertion that a defense, once raised, is not waived by a guilty plea, while that which has not been raised is thereby waived. Such a distinction is logically fantastic; it is also foreclosed by the case law. Ordinarily, a defendant who unsuccessfully asserts a defense by pre-trial motion, and then pleads guilty, has waived that defense. *E.g., United States* v. *Doyle,* 348 F.2d 715 (2d Cir. 1965) (statute of limitations); *Alexander* v. *United States,* 290 F.2d 252 (5th Cir.), *cert. denied,* 368 U. S. 891 (1961) (illegal seizure). That principle is, however, properly applicable only where the defense is known. It could not properly be applied in *Haynes* because the defense was unknown, and the plea could not have been considered a voluntary waiver. *See United States* v. *Michael,* ..... F.2d ....., 7 Crim L. Rptr. 2155 (7th Cir. 1970); *Meadows* v. *United States,* 420 F.2d 795 (9th Cir. 1969),

petition for cert. filed, 38 U.S.L.W. 3341 (U.S. Feb. 20, 1970) (No. 1217, 1969 Term; renumbered No. 94, 1970 Term); *United States* v. *Miller,* 406 F.2d 1100 (4th Cir. 1969). *See also Cotner* v. *Henry,* 394 F.2d 873 (7th Cir.), *cert. denied,* 393 U.S. 847 (1968).

Marchetti did not waive his constitutional defense by failure to raise it until after conviction. Grosso did not waive his constitutional defense by failure to assert it at any time. Haynes did not waive his constitutional defense by pleading guilty. Only on an unsound theory that the whole is greater than the sum of the parts can it be held that a defendant waives a constitutional defense not then known to exist if he both fails to assert it and pleads guilty.

No authority cited or discussed by petitioner can overcome the controlling effect of *Marchetti, Grosso* and *Haynes* and support a finding of waiver in this cause. The decision in *Brady* v. *United States,* 397 U.S. 742 (1970), turned upon considerations entirely different from those relevant to a determination of waiver in the instant case. In *Brady,* the petitioner claimed his guilty plea was involuntary because of three factors: impermissible pressure of counsel; improper promises with respect to reduction of sentence and clemency; and fear of the death penalty if he exercised his right to a jury trial.

Subsequent to Brady's conviction, this Court ruled in *United States* v. *Jackson,* 390 U.S. 570 (1968), that a provision of the law under which defendant was convicted, which allowed imposition of the death penalty only by jury, imposed an unconstitutional restraint upon the exercise of the Seventh Amendment right to jury trial and the Fifth Amendment right not to plead guilty. Although the *Jackson* decision was obviously the catalytic force behind Brady's collateral attack upon his conviction, its application was not

the sole factor in determining the success of his efforts. The discussion of the Court clearly indicates that the death penalty possibility was only one factor that the defendant had to, and must have, weighed at the time he pleaded guilty. As the Court stated:

> The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it.

397 U.S. at 749.

If Brady had raised the constitutional argument that later proved successful in *Jackson,* his basic dilemma whether to plead guilty would have remained the same, with the one exception that the possibility of imposition of the death penalty would have been removed from among the considerations relevant to his decision. If Brady had not pleaded guilty and had successfully raised the *Jackson* defense, he would still have faced the dangers of prosecution and conviction.

This must be contrasted with Mr. Lucia's situation. Respondent does not request this Court to disregard "his solemn admissions in open court" simply because it now appears that the Government would have a "weaker case than [he] . . . had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions." 397 U.S. at 757. We are not concerned here with a weaker case or a different maximum penalty. We are concerned with the right to assert a complete bar to prosecution. No attorney, without commiting an act of malpractice, could intelligently waive such a defense. *See In re Williams,* 460 P.2d 984, 81 Cal. Rptr. 784 (Cal. 1969) (holding counsel constitutionally inadequate where he failed to raise a defense which would have barred prosecution for a particular statutory offense, but

instead permitted his client to plead guilty). *See also United States* v. *Brierley,* 300 F. Supp. 638 (E.D. Pa. 1969). Thus, while it is quite appropriate to consider waiver in a case such as *Brady* where retroactive application of a new constitutional rule alters one factor in a cluster to be considered in determining whether to plead guilty, it is entirely inappropriate where the new constitutional rule provides a complete bar to the offense in question. A finding that Mr. Lucia had intelligently waived the constitutional defense recognized by *Marchetti* and *Grosso* would obviously be a pure, and highly unworthy, legal fiction.

This Court has also recognized in civil cases the inappropriateness of using the doctrine of waiver as an impediment to the retroactive application of complete defense. In defending the civil libel action of *Curtis Publishing Company* v. *Butts,* 388 U.S. 130 (1967), Curtis failed to raise the constitutional defense that was subsequently deemed controlling in *New York Times* v. *Sullivan,* 376 U.S. 254 (1965). Following a verdict unfavorable to *Curtis,* this Court handed down its decision in the *New York Times* case. Curtis promptly filed a motion for new trial based upon an application of the constitutional defense recognized for the first time in that case. This motion was denied by the trial court and the Fifth Circuit affirmed. 351 F.2d 702 (5th Cir. 1965).

This Court disagreed, however, with the Fifth Circuit's holding of waiver, stating:

> As our dispositions of *Rosenblatt* v. *Baer,* 383 U.S. 75, and other cases involving constitutional questions indicate, the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time. *Michael* v.

> *Louisiana,* [350 U.S. 91], at 99, but an effective waiver must, as was said in *Johnson* v. *Zerbst,* 304 U.S. 458, 464, be one of a "known right or privilege."
>
> * * *
>
> We would not hold that Curtis waived a "known right" before it was aware of the *New York Times* decision. It is agreed that Curtis' presentation of the constitutional issue after our decision in *New York Times* was prompt.

388 U. S. at 142-43, 144-45. Surely the proper administration of justice does not permit criminal defendants to be deemed to have waived a constitutional defense in circumstances in which waiver would not be found in civil litigation.

Any attempt to rely upon a notion of "untimeliness" as distinct from waiver is misplaced (Petition, p. 7). Respondent raised his constitutional defense by seeking collateral relief in the district court two weeks after this Court in *Marchetti* and *Grosso* overruled the *Kahriger* and *Lewis* decisions (Petition, p. 3). Here, as in *Curtis Publishing Company* v. *Butts,* respondent's "presentation of the constitutional issue [after the decisions in *Marchetti* and *Grosso*] was prompt." 388 U.S. at 145.

CONCLUSION

For all of the foregoing reasons, respondent submits that the decision of the court below was correct and that petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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